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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91215896
Party	Plaintiff Bells Brewery, Inc.
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

BELL'S BREWERY, INC., Opposer, v. INNOVATION BREWING, Applicant.	:	Opposition No. 91215896

REPLY BRIEF IN FURTHER
SUPPORT OF OPPOSER'S MOTION TO COMPEL

Pursuant to 37 CFR § 2.127(a), Opposer Bell's Brewery, Inc. ("Opposer") respectfully requests that the Board consider this reply brief offered in further support of Opposer's motion to compel Applicant Innovation Brewing ("Applicant") to (1) produce a knowledgeable witness in compliance with Rule 30(b)(6) of the Federal Rules of Civil Procedure and (2) answer Opposer's Interrogatory Nos. 36 and 38 in full. This reply brief serves to address and/or correct a number of statements made in Applicant's Response to Opposer's Motion to Compel ("Applicant's Response").

1. APPLICANT'S RESPONSE CONTAINS IRRELEVANT AND/OR INFLAMMATORY MATERIAL DESIGNED SOLELY TO DETRACT FROM APPLICANT'S FAILURE TO PROVIDE ADEQUATE DISCOVERY IN THIS CASE

As an initial matter, Applicant submits that, similar to other submissions made by Applicant in this proceeding (see, e.g., Applicant's Response to Opposer's Motion to Amend filed on April 1, 2015), Applicant's Response is replete with statements that are wholly

irrelevant[1] to Applicant's discovery failures that are the subject of Opposer's Motion to Compel, that seek to mislead the Board with respect to the operative facts in this case[2] and/or that are designed solely to malign Opposer.[3] These statements represent an unsuccessful effort by Applicant to detract from its failure to provide adequate and complete discovery in this proceeding and its inability to assert any valid legal or factual basis for opposing Opposer's Motion to Compel. Opposer submits that the Board should disregard or strike those portions of Applicant's Response that are not directly germane to the discovery issues raised herein. See Trademark Trial and Appeal Board Manual of Procedure ("TBMP"), §702.05 (The Board views with disfavor parties who engage in the practice of introducing irrelevant or cumulative evidence, which impedes the orderly administration of the case and obscures the impact of truly relevant evidence).

2. APPLICANT HAS FAILED TO PROVIDE AN ADEQUATE LEGAL OR FACTUAL EXPLANATION FOR ITS FAILURE TO PRODUCE A KNOWLEDGEABLE RULE 30(B)(6) WITNESS

Opposer submits that Applicant's Response does not provide any factual or legal justification for Applicant's failure to produce a Rule 30(b)(6) witness knowledgeable about deposition topics that are fundamental to the claims raised in this proceeding, including Applicant's advertising, marketing and/or promotion of its products and Applicant's future business and marketing plans therefor.

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1 For example, Applicant devotes an entire paragraph of its Response to outlining facts relating to its review and verification of the transcript for Ms. Dexter's deposition, when such review and verification have no bearing on the discovery issues raised on this Motion to Compel. See Applicant's Response at p.5.

2 For example, Applicant mentions at least ten (10) times in its Response that its application under opposition is based on its intent to use its mark (see, e.g., Applicant's Response at pp. 2, 3, 4, 12, 15, 16, 17, 20 and 22), presumably to falsely suggest that Applicant has little information or documents to produce about its mark, which has, in fact, been used since 2013 (see Opposer's Motion to Compel at p.1).

3 For example, Applicant refers to Opposer as "dilatory" and "aggressive" and seeking to "outspend Applicant" in an attempt to falsely characterize this proceeding as one of "David vs. Goliath," without accepting responsibility for Applicant's numerous discovery deficiencies which are solely responsible for driving up the parties' costs and causing delays in this case.

In particular, Applicant goes to great lengths in its Response to justify Ms. Dexter's failure to provide responsive deposition testimony by seeking to minimize the importance of this testimony (see, e.g., Section III, C of Applicant's Response at p.16), by claiming that the onus is somehow on Opposer to independently locate relevant information and documents about Applicant's business (see, e.g., id. at p. 17) and by alleging that Applicant has met its burden to inform itself as to matters "reasonably available" to Applicant (see, e.g., id. at p.5). Opposer submits that there is no legal or factual underpinning for these statements and that Applicant grossly underestimates its affirmative obligation to educate itself as to all matters relevant to this case.[4] See, e.g., Concerned Citizens of Belle Haven v. Belle Haven Club, 223 F.R.D. 39 (D. Conn. 2004) (A deponent designated to testify on behalf of a corporation has an affirmative obligation to educate himself, even if the documents regarding the matters known to the corporation are voluminous, and review would be burdensome).

Further, Applicant suggests that the onus was also on Opposer to identify its deposition topics in its Rule 30(b)(6) notice of deposition with such specificity that Applicant would know in advance what exact questions would be posed at the deposition (see, e.g., Section II of Applicant's Response at pp. 9-10). Opposer submits that its deposition topics were, in fact, described with reasonable particularity so as to comply with the legal requirements of Rule 30(b)(6). See Fed. R. Civ. P. 30(b)(6); see also, e.g., Red Wing Co. v. J.M. Smucker Co., 59 U.S.P.Q.2d 1861, 1864 (TTAB 2001). Further, it would be nonsensical to expect Opposer to put all of its deposition questions to Applicant in advance, particularly given the exploratory nature of a discovery deposition. In any event, Applicant has never objected to the form of Opposer's notice of deposition and/or the topics as described in such notice either after service thereof or at

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4 The fact that Applicant is nascent and formed of two principals (one of whom is Ms. Dexter) (see, e.g., Applicant's Response at pp. 19-20), makes it even less credible that Ms. Dexter would not already be informed as to all aspects of the business.

the deposition itself. See Fed. R. Civ. P. 32(d)(2) and TBMP 404.08(a) (objections to errors and irregularities in a notice of the taking of a discovery deposition must be promptly served, in writing, on the party giving the notice; any such objections that are not promptly served are waived); see also, e.g., Neville Chemical Co. v. Lubrizol Corp., 183 U.S.P.Q. 184, 189 (TTAB 1974) (objections to subject matter of deposition must be raised during the deposition). Accordingly, Applicant is now foreclosed from raising the impropriety of the topics as described in Opposer's notice of deposition.

Despite Applicant's above-described attempts to justify its failure to produce a knowledgeable representative, the fact remains that Opposer has been denied the legal right to obtain responsive deposition testimony on factual areas such as Applicant's advertising and planned use of its mark, which are essential to Opposer's claims in this case. The importance to Opposer of obtaining live testimony on these topics is underscored by the fact that Applicant's discovery responses have been incomplete in this case and supplemented multiple times generally only after inquiry or prompting by Opposer. See, e.g., Opposer's Motion to Compel at pp. 1-4. Based on this, Opposer rests on its prior submissions made in its Motion to Compel requesting that a knowledgeable witness be produced or that Ms. Dexter be re-produced after adequate preparation to provide relevant testimony so that Opposer may obtain full and complete discovery.

Finally, Applicant's arguments that it should not be ordered to travel to Kalamazoo, Michigan if the Board orders the continuation of Opposer's Rule 30(b)(6) deposition are equally unpersuasive. The parties' relative sizes and financial resources should not be considered in determining the location of the deposition. Applicant should bear the cost of travel because the additional expenses are due solely to Applicant's failure to comply with the applicable rules. In

any case, Opposer will have to bear the cost of additional attorney time, court reporter fees and limited travel expenses. Opposer should not be further punished simply because it brews more barrels of beer per year than Applicant. Moreover, Applicant's argument that Opposer's New York-based attorneys will have to travel to Michigan for the deposition ignores the fact that Opposer's co-counsel is located in Kalamazoo.

3. APPLICANT HAS NOT ASSERTED ANY ACCEPTABLE LEGAL OR FACTUAL BASIS FOR FAILING TO PROVIDE COMPLETE INFORMATION IN RESPONSE TO OPPOSER'S INTEROGATORY NOS. 36 AND 38

Applicant incredibly claims in its Response that it has provided full and complete answers to Interrogatory Nos. 36 and 38. However, as both the Interrogatory Responses themselves and Applicant's Response shows, this assertion is false. First, Applicant admits that it has had conversations with individuals, but does not further identify these individuals in its Interrogatory Response No. 36, even though this calls for an identification of all individual(s) and/or organization(s) with whom or which Applicant has consulted in connection with Opposer's claims against Applicant and/or this Opposition. See Applicant's Response at p. 21-22. On this basis alone, Applicant should be compelled to supplement its response with specificity.

Moreover, Applicant refuses to supplement its response beyond a broad statement consisting of "Miscellaneous friends, family, and acquiantances [sic]" (Robertson Decl. ¶ 15, Exhibit M), in part, on the basis that such information would not "have any value to Opposer in making its case" (see Applicant's Response at p. 22), which Opposer disputes given that Applicant, *inter alia*, has sought to derive benefit from the reputation of Opposer's mark, causing a likelihood of confusion. In any case, Applicant is legally foreclosed from making this

argument because Applicant waived its right to object to this interrogatory based on relevancy when it failed to make a timely objection in its initial responses served many months ago. See Fed. R. Civ. P. 33(b)(4).

Applicant's Response to Interrogatory No. 38 also suffers from the same deficiencies as its Response to Interrogatory No. 36. Nevertheless, Applicant states that all of the identified and *unidentified* persons express the same opinion that no likelihood of confusion exists. See Robertson Decl. ¶ 15, Exhibit M. Applicant's claim that its principals should not be "expected to recall every single individual with whom they have discussed this opposition," (Applicant's Response at p. 21) lacks credibility in light of the fact that Applicant does seem to recall the actual content or subject matter of the conversations in issue. For these reasons and those stated in Opposer's moving brief, Applicant should be compelled to supplement its response to Interrogatory Nos. 36 and 38.

CONCLUSION

Based on the reasons set forth above and the reasons set forth in Opposer's moving papers, Opposer respectfully requests that its Motion to Compel be granted. Specifically, Applicant should be ordered to: (1) appear for another Rule 30(b)(6) deposition in Kalamazoo, Michigan with a knowledgeable witness and (2) supplement its responses to Interrogatory Nos. 36 and 38 with full and complete answers.

Dated: New York, New York
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CERTIFICATE OF SERVICE

I hereby certify that on this 14 day of May, 2015, a copy of the foregoing REPLY BRIEF IN FURTHER SUPPORT OF OPPOSER'S MOTION TO COMPEL was served on Applicant via First Class Mail, postage prepaid to:

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